Brown, Brian (TM)

From: Morris, Craig
Sent: Wednesday, January 12, 2011 12:07 PM
To: Brown, Brian (TM); Hickey, Toni
Subject: FW: Small Business Study

-----Original Message-----
From: Melhi (b)(6)
Sent: Tuesday, January 11, 2011 8:24 PM
To: TMFeedback
Subject: Small Business Study

I know I'm likely too late for my feedback to be considered, but I did not learn about this survey until last night and I'm hoping, perhaps to make it onto the stack.

I'm going to stray from your survey questions to offer my comments.

I market slogans and to a lesser extent, photography and art on T-shirts, bumperstickers, coffee mugs, greeting cards, etc., using various online Print On Demand (POD) fulfillment services (most notably, Zazzle and CafePress.) My company consists of me. My income varies, but 2010 will be my best year and, while I haven't crunched the numbers for my taxes, yet, will probably turn out to be between $5k and $6k. I am as small as it gets and I operate on the bottom rung of what I call the sloganeering industry.

I own no trademarks, so... How do TM bullies affect me?

Let me start with what happened, yesterday. I had created a new line of anti-Valentine's slogan designs. Simple hearts with anti-Valentine's sentiments in them. 27 sentiments, each available on 4 different hearts - green, pink, orange & purple. I spent 2 18 hour days writing slogans, rewriting slogans, whittling the list from more than 60 to just 27, choosing fonts, colors, drawing & editing the heart in high res, creating the designs and uploading them to the Zazzle service. I then spent 3 18 hour days creating & writing SEO copy for 28 categories & 108 subcategories as well as placing, positioning and resizing each of 108 total designs onto 18 products each, writing SEO/descriptive copy for each of the 1,944 products and tagging each of those 1,944 products for the Zazzle internal search engine.

As I was working on ad copy, yesterday, to begin promoting the new line - and sketching out plans to combine multiple of the hearts by themes onto products in a 28th category, I began receiving notices from Zazzle - one notice for each apparel item that bore a heart with the sentiment "OMFG U Reek." Unlike some of the sentiments I chose to use, this particular slogan is not generic or common, it is a phrase that is unique to and originated with me... each individual word in the slogan, though, has long been in common usage. .

These apparel items had been removed from my store because Zazzle had been notified, last year, by an individual who had somehow successfully trademarked the common internet slang acronym "OMFG" (which has long been in the commercial marketplace and stands for "Oh My Fucking God") threatening lawsuits & demanding that all existing apparel products bearing the word be removed from the service and that no further use of the word be allowed on apparel. Apparantly, he sent C&Ds and threats of lawsuit to several individual designers and to other POD companies, including CafePress.

This acronym originated in the public domain, not with this individual and it had long been in use, both in private pop culture colloquial use, where it went from internet slang to being used aloud and it has also long been used in commerce, including on shirts. Prior to approval of his trademark, this individual did not contact Zazzle or any designer using Zazzle or any other service to ascertain whether he was first to market. I've learned over the course of the last 24 hours that his original threats included informing those whose commercial use predated his that his trademark had officially changed the

meaning of the acronym to "Oh My Fabulous God" (A. It does not. He didn't coin the term, he stole it. B. As this has nothing to do with enforcing his trademark, it seems to further demonstrate his desire to control the word, not to protect intellectual property.

In short, he duped the USPTO into letting him trademark a common acronym that the USPTO may not have known was a common acronym in heavy colloquial and commercial use and that did not originate with him. He knew the acronym was already in heavy commercial use and did not do his due dilligence in regards to establishing that he was first to market - to the contrary, he identified prior use and waited until his trademark was live, contacting them to shut down not only the competition who'd beaten him to market but also to prevent any and all future use of the word he stole, whether an infringement of his live trademark or not.

I am told that Zazzle was not the only fulfillment service he contacted upon approval of his trademark. Thus, the TM owner has successfully blocked all use of a common and currently "hip" pop culture term.. We are the absolute bottom rung of our industry. In our portion of the market, he has a monopoly on a term he did not originate and that was in no way associated with him or his products in the public eye prior to or even since locking down the term to create a monopoly on the phrase.

For those of us who use the Print on Demand fulfillment services, this TM bullying is increasingly common. We are far more likely to see it from individuals and smaller businesses who seem to be buying up common words and phrases, specifically to monopolize them and/or to use them as lawsuit bait. I've been doing this since 2005 and for the entirety of my time in this industry, the reputation of the USPTO in our bottom-rung circles is that the USPTO will approve any trademark - rules/laws & intent be damned - so long as the check doesn't bounce and that there is no system in place to enforce the rules when it's the trademark owner breaking them, because we don't butter the bread. It's been open season on us for longer than I've had my iron in this fire... and it is getting more and more ridiculous. Ask in the forums at CP or Z which words or phrases you should stay away from - you'll get a long list and you'll be shocked at the words, phrases, patterns and simple shapes on it.

For the most part, when one of us gets a notice that there's a trademark issue regarding a mark owned by a large company, it's almost always a legitimate, albeit accidental, infringement. (Most often, it's the uneducated hobbyist who doesn't understand that it doesn't matter that they drew the Mickey Mouse themselves, Mickey belongs to Disney who will get notices on infringements of trademarks belonging to the big corporations.) When there is a question, it usually turns out to be a matter of our fullfillment services having been advised by their own legal teams to avoid any question by being overly cautious due to the vast resources available to the larger company, should they press it, than it is a matter of the company itself having employed bullyiing tactics. Thus, the small time thugs have essentially turned the larger companies' legitimate attempts to protect their trade/service marks into bullying-by-proxy. PLEASE contact Zazzle and CafePress to discuss this topic... they bear the brunt of these tactics, are affected on a larger scale than I am and they know more about dealing with the bulllies than I do.

The absolute most notorious and ruthless TM bully in our "world" is unaffectionately referred to as "The Caution Guy" (he owns Caution Underwear and unlike the trademark on OMFG, his trademark on the word "Caution" is actually very specific. This makes it easier for other designers, like me, to know for certain whether an intended use will infringe on his mark. This should be the case for ALL common words/phrases/etc that are trademarked.)

However, The Caution Guy is a TM bully who threatens litigation on EVERY use of the word "Caution" -- even uses that the USPTO explicitly spelled out to him in the files on this mark that his trademark does not extend to and that he cannot enforce on others. The fulfillment services, not wishing to see their budgets drained by fending off lawsuits when it's free and simple to just pull the designs, now pull any product they find on their services which includes the word "Caution" in the graphics, the descriptions, product/design names, search tags, SEO copy, etc. The word is off limits. "The Caution Guy" owns the word, lock stock and barrel - we joke that we're surprised he allows it to be printed in the dictionary.

"The Caution Guy" has effectively locked the smallest businesses in the sloganeering market from using this common word from our dictionary in any way on any wares. That is not the intent of allowing us to own trademarks and letting him and others like him hijack whole swaths of the language breeds not only a lack of respect for the USPTO, but a

contempt for Trademark owners - and lowers the public's perception of the importance of a Trademark, the importance of respecting Trademarks & of legitimately enforcing them when they are not respected. It also removes from the public conciousness what a privelege it is that we, as private citizens, are allowed to own Trademarks.

I would like to suggest that a representative from the USPTO or the Secretary of Commerce's office contact Zazzle & CafePress (and perhaps other fulfillment services, as well, but these are the two most widely used in our industry) and not only solicit their experiences, directly, but also follow up by asking them to solicit feedback from shopkeepers, like me, in their forums, regarding some of the worst offenders you uncover by comparing the experiences of these companies. I'm a small fish - they are the small ponds I swim in. They will be of infinitely more help to you than I can describe.

Some of my fellow POD designers have been targetted directly with cease & desists or worse lawsuits that were not prefaced with C&Ds. But, usually, the TM bullies don't deal with us, directly, they go after the fulfillment companies. On the one hand, this is a blessing as the vast majority of us, myself included, make less than $100/mo from our endeavors and cannot afford to fend off these kinds of threats/suits. On the other hand, it prevents any of us from having any form of recourse or remedy.

I'm not a big business with resources for legal teams. My finances are such that I can't even justify the cost of registering a trademark on my own brand name - something I've long wanted to do and hope to do someday.

I'm a full time mom with an emptying nest who used to be successfully self employed in residential construction, lost everything and then some after a divorce 15 years ago and has been struggling just to stay at "break even" ever since. My current husband (of nearly 13 years) is employed outside the home... thus, we are far more fortunate than many of my contemporaries who use the POD fulfillment services. We aren't trying to survive solely on my income from this. My income from this endeavor is not making me wealthy, it is not even enough to survive on, if we suddenly find we must. It simply helps us make the ends meet -- and, with jobs so scarce, it allows me to leave a job free for someone whose household would not have one, otherwise. And yes, that is a factor that weighed heavily into my decision to stay out of the job market and try to do this as a viable micro-business, not just a hobby that might result in a small paycheck and worthless ego stroke once or twice a year.

As with the vast majority of us who use the Print On Demand fulfillment services, I cannot afford a brick & mortar storefront or printing equipment or back stock of blanks to print on. I have time & talent to invest - not money. I rely on the fulfillment services to fill in the gaps I cannot - and they do such an excellent job of it that I wouldn't do it the old fashioned way even I could afford to buy the equipment. My "company" consists of just me. My operating budget is non-existent. Some months, I don't make enough to clear the $25 minimum to receive a check at all, other months, I might make as much as a couple of hundred dollars. Most of the monthly checks I receive are between $35 and $75. One of my shirts made international news, earlier this year - it was talked about on news programs and joked about on talk shows and discussed by DJs across the nation. Even with that kind of huge pop culture fad push, I made only around $4,000 before the fad was over and the sales stopped on that shirt. This shows that I will never be wealthy from this endeavor. I am and will always be "small potatoes." The smallest potatoes. The easiest to bully. You will find the same true of most of my contemporaries... we are easy prey... and the bullies know it.

What I'd like to see:

1. I would like to see existing trademarks of common words reviewed. The trademarks should be very specific for common words and phrases and this should be spelled out so that both the owner and others who wish to use those words or phrases, know exactly what is allowed and what is not. Some TMs should, perhaps, even be revoked and those words/terms officially placed back in the public domain where they belong.

2. I would like to know where I can review a list of words/phrases that are in the publication phase, so that I can look over the list, occasionally and file objections when I am prior to market and my business will be damaged. I have looked, but I cannot find it. Also - if the applicant must provide the date (or at least year) they first entered commerce with a term or phrase, I'd like to know where in the TEAS files on a TradeMark I can find that date and how/if I can dispute the validity of a live TM of a word or phrase

I can prove I entered commerce with prior to that date. And what suffices as proof, since what I believe may suffice, may in fact not.

3. I would like for there to be recourse for victims of TM bullies - starting with putting a system for us to report them or file complaints on them and real penalties for the bullies, ranging from steep fines, financial recompense and punitive awards to their victims, revocation of the trademarks they've abused, to perhaps even jail time in extreme cases.

4. A system put in place where we can contest existing trademarks falling under very strict guidelines... words/phrases that the folks working in the USPTO may not have realized were created in the public domain and were already in common usage both colloquially and in commerce, when the mark was granted. (Nobody can be expected to know everything.)

5. A higher fee, clearly spelled out, strict guidelines for the use* of and shorter term for trademarks of common words and phrases. (* Example: I would like to see "The word, used alone, or itself captioned with a slogan appearing in different typeface, below it, with this exact spelling, in all capital letters, with or without artwork used solely as font dress, followed by three explanation marks - appearing horizontally on the left sleeve or on the left pocket (or pocket area, where no pocket is present) of short sleeve shirts or the same areas of long sleeve shirts" as opposed to a carte blanche "The word, spelled with 6 letters. Used on shirts, pants, belts, underwear, outerwear, hats or other apparel items.")

4. I would also like to see TM atty's who help fascilitate bullying behavior face penalties that increase with repeated offenses and culminate in disbarrment. Some of the TM owners who engage in this behavior may be following a cultural example set by TM bullies and believe they are legitimately in the right and simply not realize that they're abusing their trademarks, but their attorneys know the limits and the laws and it is their job not only to represent their clients, but to inform their clients as to the law and the limits of their trademarks, not to help or encourage them to thumb their noses at the USPTO and trademark laws for profit.

5. I and others like me on the bottom rung, have no recourse available to us because they go after the fulfillment companies to block us from legitimate uses, en masse... and most of us cannot afford the recourse that would exist if they came at us directly. We need some avenue for official clarification and remedy. I would like to see a system in place where people like me could contact the USPTO about situations like I encountered, yesterday, to ask for clarification & guidance. I don't know exactly what I'd like to see on the other end of the contact, but the TM bully has the advantage of official paperwork. He/she has an official document that says, "I own this word." As the victim of the bully who threatens a case, unless the threat progresses to a court battle in which I am the defendent and which I cannot afford, I have no means by which I can obtain an official document that says I am not infinging on that trademark with my commercial use on those specific products or product types.

How this will affect me & my contemporaries on the bottom rung, if nothing is done:

Increasingly, designers who market through the fulfillment services are talking about it becoming necessary to shift focus away from designing and marketing wares to buying up common words and phrases and retain them for our own use. Some of these discussion center around this being necessary to continue working in our industry. Others of these discussions center around it being a lucrative business on its own - either as lawsuit bait or similar to how businesses in the mid to late 90s made a killing buying up cheap domain names for common words, brand names, celebrity names, etc. for $30 each and reselling them for thousands each.

This is too expensive for most of us - as individuals. But, because we are largely micro-businesses, we already form small private groups in which we pool our resources and skills. I am an equal partner in one of these groups, myself. There are 7 of us, including me, in my group. The group is a necessity. $100/yr. for a website is easier to afford when you're splitting the expense with 6 other people. Keeping content fresh, so it's indexed regularly takes less time & effort when copy writing is split seven ways. If each of us can afford one 30 day ad, per year, on a popular website, separately, pooling our resources and advertising our shared website instead of our individual shops means each of us is being promoted on that site for 7 months, instead of just one month

each, for the same cash outlay each.

When the topic of buying up trademarks turns joking or angry bluster to calmer, more serious pondering aloud, it always includes talk of a larger group of designers banding together and forming a corporation solely for this purpose and most of the talk is around starting with punctuation and the most common words, "and," "it," "you," "but," "or," etc. This is regardless of whether the talk arises from a desire to protect parts of the language so there's enough of it available to continue working or whether it's in regards to make a living off the trademark ownership, itself. Because we sometimes encounter bullies who are protecting common patterns and shapes, this talk does also extend to trademarking generic things like polka dots, squares, plaid (not a specific plaid, all plaid,) stripes, etc. You might laugh, but from where we sit, we see no evidence that it would not be relatively easy for someone to obtain a trademark they could then enforce as though it encompassed any and all use of that word, punctuation, pattern type or shape.

If this ever goes from talk to action - and to my knowledge, it's just talk in our niche, at this point - it will force others across the whole of the creative spectrum to choose between doing the same, simply to reserve to themselves a group of words to work with, or to abandon the creative fields, altogether. Even joined together, groups of designers on the bottom rung could never buy up what just one large corporation with investors, credit and large capital reserves can, if it ever becomes a full blown trend. And it wouldn't take a large corporation long to corner the T-shirt market simply by buying up what's left of the dictionary.

Granted, it may never progress beyond talk at my level of this industry and we may never see large corporations monopolizing the entire language. But, there is already at least one popular television host who is rumored to actually be investing in trademarks of common words and phrases. I've also heard rumors that an international shoe corporation is buying up trademarks on old sayings that are already and should always remain in the public domain. Even if the rumors are untrue, that the rumors are out there says that a trend could be beginning and something needs to be done before it spreads.

Thanks for letting me share - and if you read this far, thank you for listening, it means a lot. Finding your survey, albeit late, gives me hope.